

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LEONARD McCENZIE,
Plaintiff,

vs.

SERGEANT M. McCLATCHIE,
CORRECTIONS OFFICER ANDREW DUPRAT,
CORRECTIONS OFFICER NEIL GUERIN,
CORRECTIONS OFFICER B. BOGETT,
CORRECTIONS OFFICER R. STEVENS, and
CORRECTIONS OFFICER B. DRAYSE,

Defendants.

**DECISION
and
ORDER**

05-CV-618A(F)

By order filed January 10, 2008 (Doc. No. 77), Plaintiff's motion to compel (Doc. No. 53) was granted and Defendants directed to show cause why sanctions should not be imposed. By Declaration of Delia D. Cadle, Assistant New York Attorney General, filed January 18, 2008 (Doc. No. 80) ("Cadle Declaration"); Defendants maintain that sanctions were not warranted; Plaintiff's reply, if any, was to be filed within 10 days after the filing of Defendants' response. Doc. No. 77 at 2. To date, no reply has been filed by Plaintiff.

Based on the Cadle Declaration, Defendants have now complied fully with the court's prior order of October 11, 2006 directing Defendants provide Plaintiff with copies of all photographs in connection with the investigation of Defendants' alleged assault on Plaintiff which is the basis for the instant lawsuit. Defendants also have apologized to the court for Defendants' unintentional failure to comply with the court's prior order citing incomplete communication between the Five Points Correctional facility staff regarding

the existence of the photographs and Defendants' prior attorney who was responsible for compliance with the court's order. In any event, all of the requested photographs subject to the October 11, 2006 order have now been produced to Plaintiff or will be provided shortly. Cadle Declaration ¶¶ 5-6. Further, to date, Plaintiff has not demonstrated any prejudice as a result of such delayed production. Moreover, Defendants have moved for summary judgment and Plaintiff has filed, on January 29, 2008, an affidavit in further opposition, based on the provided photographs. Under these circumstances, despite Defendants' prior counsel's oversight, which the court does not condone, insufficient grounds for sanctions are present. See *Outley v. New York*, 837 F.2d 587, 590-92 (2d Cir. 1988) (good faith error in failing to provide discovery does not warrant sanctions in absence of prejudice to requesting party or infeasibility of continuance).

CONCLUSION

Based on the foregoing, no sanctions are imposed upon Defendants.

SO ORDERED.

/s/ Leslie G. Foschio

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

Dated: February 4, 2008
Buffalo, New York

PLAINTIFF IS ADVISED THAT ANY APPEAL OF THIS DECISION AND

ORDER MUST BE TAKEN BY FILING WRITTEN OBJECTION WITH THE
CLERK OF COURT **NOT LATER THAN 10 DAYS** AFTER SERVICE OF
THIS DECISION AND ORDER IN ACCORDANCE WITH FED.R.CIV.P.
72(a).